OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F25-17

Ministry of Energy and Climate Solutions

Alexander R. Lonergan
Adjudicator

March 11, 2025

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA) two applicants separately requested access to a report about the Site C Dam from the Ministry of Energy, Mines and Low Carbon Innovation (Ministry). The Ministry refused the applicants access to the entire report, and both asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. The OIPC reviewed the first applicant's request and ordered the Ministry to disclose some information from the report. In this matter, the Commissioner's delegate determined that conducting the second applicant's inquiry would constitute an abuse of process and cancelled the inquiry on that basis.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 12(1), 56(1).

INTRODUCTION

[1] A journalist (applicant) sought access to a report about the Site C Dam from the Ministry of Energy, Mines and Low Carbon Innovation (Ministry) and was denied access under several exceptions to disclosure in the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision.

[2] The OIPC paused its handling of the applicant's review while it decided another individual's earlier request involving the Ministry's decision to refuse access to the same record under the same FIPPA exceptions. The OIPC conducted an inquiry into the earlier matter and issued Orders F24-37 and F24-43 (together, the "Earlier Orders").[1] After the Earlier Orders were issued, the Ministry provided the applicant in this matter with a copy of the final report which

[1] Order F24-37, 2024 BCIPC 45 (CanLII); Order F24-43, 2024 BCIPC 51 (CanLII).

had been severed in compliance with the Earlier Orders. Despite this, the applicant requests that her request for review nonetheless proceed to inquiry.[2]

[3] In this matter, as the Commissioner's delegate I will decide under s. 56(1) of FIPPA, whether to conduct the inquiry that the applicant requests.

Background[3]

[4] The applicant asked the Ministry for access to both an interim and a final version of a report about the Site C Dam under FIPPA.[4]

[5] The Ministry identified one record of a completed report to government (final report) and refused access to all of it under multiple FIPPA exceptions to disclosure. The applicant asked the OIPC to review the Ministry's decision to withhold the entire final report. Mediation by the OIPC did not resolve the matter and the applicant requested an inquiry be conducted.

[6] Shortly before the applicant submitted her request to the Ministry, the Ministry received a request from another individual for the same report as the one that the Ministry withheld in this matter. The Ministry's severing decisions with respect to the earlier access request was the subject of a separate OIPC inquiry that resulted in the Earlier Orders.[5]

[7] The OIPC paused its handling of the applicant's matter until the outcome of the inquiry into the earlier access request was known.

[8] After the other inquiry concluded, the Ministry provided the applicant in this matter with a copy of the final report which had been severed in compliance with the Earlier Orders. In light of this, the OIPC asked the applicant if she would like to withdraw her request for an inquiry into the Ministry's response to her access request. The applicant requested that the Ministry's response to her request nonetheless proceed to inquiry.

[9] The OIPC then informed the parties that it was considering whether to conduct the inquiry and invited them to provide submissions. Each party provided both an initial and a reply submission.[6]

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[2] Applicant's email to Registrar of Inquiries, November 5, 2024.
[3] The information in this background section is based on information provided in the parties' submissions and evidence. It is not information that is in dispute.
[4] All sectional references refer to FIPPA unless stated otherwise.
[5] Order F24-37, 2024 BCIPC 45 (CanLII); Order F24-43, 2024 BCIPC 51 (CanLII).
[6] Director of Adjudication's letter to the parties, November 12, 2024.

Preliminary Matter - Interim Report

[10] The applicant's access request was for access to both the interim and the final versions of a special advisor's report about the Site C Dam. While the applicant acknowledges the final report was the subject of the Earlier Orders, she said the interim report was not.[7] In the Ministry's submissions in the present matter, it did not say anything about the existence of an interim report.

[11] The investigator's fact report for the present matter does not reference the interim report as a record in dispute. Additionally, the issues listed in the fact report do not include a s. 6(1) complaint about the adequacy of the Ministry's efforts to locate an interim report. Section 6(1) requires a public body make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[12] I wrote to the Ministry seeking its position with respect to the interim report. The Ministry replied that it does not have an interim report. It explained that while the terms of reference for the special advisor included the preparation of an interim report, he never provided an interim report to the Ministry. The Ministry says that s. 6(1) is not at issue in this inquiry and the inquiry is not the appropriate forum to address a concern relating to the adequacy of its search for responsive records.[8]

[13] Taking the above into account, it is clear to me that the Ministry's compliance with its duties under s. 6(1) and the interim report are not at issue in this inquiry. Therefore, the interim report will not factor into my analysis of whether the OIPC should conduct the inquiry.

[14] If the applicant is dissatisfied with what the Ministry says about not having an interim report, she has the option of making a separate s. 6(1) complaint about that to the OIPC.

DISCUSSION

Issue and burden of proof

[15] The issue I must decide in this application is whether I should exercise my discretion as the Commissioner's delegate under s. 56(1) to not conduct an inquiry.

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[7] Applicant's response submission at 2.
[8] Ministry's letter, February 4, 2025.

[16] FIPPA is silent about which party bears a burden of proof for inquiries that consider s. 56(1). The Ministry says that it bears the burden of showing why the Commissioner should not conduct an inquiry.[9]

[17] Past OIPC decisions that consider the Commissioner's discretion under s. 56(1) typically place a burden on the public body to show why an inquiry should not be held under s. 56(1).[10] Unlike the current matter, many of those decisions arose from a public body's proactive request to not conduct an inquiry. While those decisions do not clearly explain why the burden of proof was placed on the public body, it seems to me that the reason for this approach is a general principle that the party who applies for discretionary relief should bear the burden of proving its entitlement to that relief.[11]

[18] In this case, the Ministry did not proactively apply to the Commissioner for a decision to not conduct an inquiry under s. 56(1). Instead, the OIPC raised the s. 56(1) issue and invited the parties to provide submissions.

[19] Taking these circumstances into account, I find that neither party in this matter bears a burden to prove that the Commissioner should conduct an inquiry (or not) under s. 56(1). I will consider all of the available evidence and arguments while deciding how to exercise my discretion under s. 56(1).

Section 56(1) – Commissioner's Discretion to Conduct an Inquiry

[20] Section 56(1) of FIPPA reads as follows:

> **56(1)** If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[21] The word "may" in s. 56(1) provides the Commissioner or their delegate a broad discretionary power to decide whether to hold an inquiry.[12]

[22] Past orders have concluded that the grounds under which the Commissioner may decline to conduct an inquiry are open-ended, including situations where it is plain and obvious the records fall under a particular FIPPA

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[9] Ministry's initial submission at para 18.
[10] See for example: Order F08-11, 2008 CanLII 65714 (BC IPC), at para 8; Decision F07-04, 2007 CanLII 67284 (BC IPC), at paras 16-18.
[11] Decision F07-04 at para 17; Order 01-03, 2001 CanLII 21557 at para 7, citing *Nesbitt Thomson Deacon Inc. v. Everett*, 1989 CanLII 2763 (BC CA) (see para 29); Similar reasoning was applied to the related doctrine of issue estoppel in *Schweneke v. Ontario*, 2000 CanLII 5655 (ONCA) at para 38, cited by Order F22-05, 2022 BCIPC 5 (CanLII) at para 17 and Order F17-39, 2017 BCIPC 43 (CanLII) at para 12.
[12] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 835 (CanLII), at para 47; Order F23-23, 2023 BCIPC 27 (CanLII), at para 32.

exception or outside the scope of FIPPA, or where the doctrines of res judicata, issue estoppel, or abuse of process apply.[13]

Parties' Positions, s. 56(1)

[23] The Ministry asks that the OIPC exercise its discretion under s. 56(1) to not hold an inquiry. The Ministry says that that conducting an inquiry would constitute an abuse of process. In addition, the Ministry argues it is plain and obvious that the outcome of an inquiry will confirm that the Ministry properly applied FIPPA.[14] Based on what the Ministry says in its submissions, I understand the Ministry to mean that it is plain and obvious a second inquiry would lead to an identical outcome as the Earlier Orders.

[24] The applicant raises several reasons in favour of holding an inquiry. She says that an inquiry is necessary to uphold her access rights, that circumstances have changed after the Earlier Orders were issued which change the application of certain exceptions to disclosure, and that the Ministry did not adequately explain its severing decisions.

[25] In her submissions, the applicant does not specifically argue that a second inquiry would not be an abuse of process or that the outcome of such an inquiry is not plain and obvious. I understand the applicant's position to be that an inquiry should be conducted for the reasons she raises regardless of what the Ministry says about abuse of process and the outcome of an inquiry.

[26] I will first consider the reasons that the applicant gives in favour of conducting an inquiry before determining whether conducting an inquiry would be an abuse of process. Then, if necessary, I will consider the Ministry's argument that the outcome of an inquiry is plain and obvious.

Applicant's Arguments in Favour of Conducting an Inquiry

[27] The applicant argues that declining to conduct an inquiry would violate her access rights, which she says includes the right to have the OIPC consider her arguments in an independent inquiry.[15]

[28] As mentioned above, the word "may" in s. 56(1) provides the Commissioner or their delegate with the discretion to conduct an inquiry. I am not aware of any provision of FIPPA that entitles a party to an inquiry. The applicant does not point to a provision that creates such a right and I am not persuaded

[13] Order F23-23, 2023 BCIPC 27 (CanLII), at para 32 and the authorities cited therein; Order F21-05, 2021 BCIPC 5 at paras 10-11; Decision F08-11, 2008 CanLII 65714 (BC IPC), at para 8.
[14] Ministry's initial submission at para 1.
[15] Applicant's initial submission at para 12; Applicant's response submission at 1-2.

that one exists. I find that the applicant's access rights under FIPPA do not include a right to have the OIPC conduct an inquiry.

[29] Many of the applicant's other arguments criticize a lack of explanation from the Ministry as to why it chose to apply certain provisions of FIPPA to the final report. This criticism is premature and of limited relevance to this s. 56(1) decision. An explanation of the Ministry's severing decisions would appear in its submissions in an inquiry, whereas the issue before me is whether an inquiry should be held in the first place. I find that the applicant's desire for further explanations is not a reason that favours conducting an inquiry in this matter.

[30] Next, the applicant makes detailed arguments about s. 12(1) and whether that exception to disclosure applies to any information given the Ministry's decision to complete and fill the Site C dam.[16] In response, the Ministry says that the Earlier Orders already considered the Ministry's publicly announced decision to complete the Site C dam and whether any information remained severable under s. 12(1) notwithstanding that decision.[17]

[31] While the applicant's specific arguments under s. 12(1) are beyond the scope of this s. 56(1) decision, I understand her position to be that another inquiry is necessary to reconsider the Ministry's reliance on s. 12(1) due to a change of circumstances after the OIPC issued the Earlier Orders.

[32] I have considered the timing and content of the Ministry's announcements as well as what the Earlier Orders say about s. 12(1). I see no material change of circumstances since the Earlier Orders were issued that justify revisiting this issue in another inquiry. I conclude that the Ministry's announcements and activities after the Earlier Orders were issued do not support re-considering s. 12(1) in a new inquiry.

[33] Although the applicant bears no burden to establish that there is a reason to hold a second inquiry, I am not persuaded that an inquiry should be conducted for any of the reasons she provides.

Abuse of Process

[34] I will now consider the Ministry's argument that a second inquiry should not be held because conducting an inquiry would constitute an abuse of process.

[35] "Abuse of process" is a flexible doctrine that can apply in a variety of legal contexts. Abuse of process recognizes a court or administrative tribunal's inherent jurisdiction to prevent the misuse of its own procedures in a way that would be manifestly unfair to a party to the litigation or would otherwise bring the

[16] Applicant's initial submission at paras 19-21; Applicant's response submission at 2-3.
[17] Ministry's reply submission at paras 17-21; Order F24-37, 2024 BCIPC 45 (CanLII), at para 87.

administration of justice into disrepute. Its primary focus is the integrity of the adjudicative functions of courts and tribunals.[18]

[36] Canadian courts have applied abuse of process to prevent re-litigation of claims in cases where the strict requirements of issue estoppel are not met, but allowing the litigation to proceed would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. Abuse of process may also apply where proceedings are oppressive or vexatious and violate the fundamental principles of justice underlying the community's sense of fair play and decency.[19]

[37] The Ministry says the applicant is attempting to re-litigate issues that the OIPC already decided which it says is an abuse of process.[20] The Ministry explains that a second inquiry would deal with the same record and exceptions at issue in the Earlier Orders, and that the applicant raises no novel arguments or material changes in circumstances.[21] Conducting this inquiry, the Ministry argues, would violate the principles of finality, judicial economy, and consistency, leading to an abuse of the OIPC's review process.

Analysis, Abuse of Process

[38] I will first consider whether a second inquiry would be a re-litigation of the same issues that the Earlier Orders decided. If I conclude that it is, then I will decide whether such re-litigation is an abuse of process.

[39] As a starting point, unlike the related doctrine of issue estoppel, abuse of process does not require that the parties be the same in both proceedings. Instead, abuse of process is focused on the integrity of the adjudicative process instead of the specific status or interests of the parties.[22]

[40] The Ministry argues that the Earlier Orders have already determined whether the Ministry is required or authorized under ss. 12(1), 13(1), 14, 17(1), 19(1), 21(1) and 22(1) to refuse access to information in the final report. The Ministry says that the record and severing decisions at issue in this matter are identical to those that the Earlier Orders addressed.[23]

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[18] *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII) [*Toronto*], at paras 42-44.
[19] *Ibid.,* at paras 35 and 37, citing *R v Scott*, 1990 CanLII 27 (SCC) at p 1007; Order 01-16 at paras 37-39; Order F24-89, 2024 BCIPC 101 (CanLII) at paras 25-27.
[20] Ministry's initial submission at para 1(b).
[21] Ministry's initial submission at para 60; Ministry's reply submission at paras 37-40.
[22] *Toronto, supra* note #18 at paras 37 and 51; *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 (CanLII) [*Figliola*] at para 52; See also: Decision P12-01, 2012 BCIPC 11 (CanLII) at paras 32-36.
[23] Ministry's initial submission at paras 12-15 and 47.

[41] I have compared the Earlier Orders and the OIPC fact report from that case to the submissions and fact report in this matter. This comparison establishes that on June 1, 2021 the Ministry separately provided the applicant and the individual in the earlier matter with the identical reason for denying them access to the final report, i.e., the report was withheld in its entirety under ss. 12(1), 13, 14, 16, 17 and 19 of FIPPA. The OIPC has already adjudicated the Ministry's application of those FIPPA exceptions to the final report and issued its reasons in the Earlier Orders. The exceptions to disclosure that the applicant challenges are the same exceptions that the adjudicator of the Earlier Orders considered and allowed, in part. Additionally, the applicant appears to have no meaningfully different relationship to the disputed information than the applicant in the Earlier Orders.

[42] Having considered these circumstances and the content of the applicant's submissions, I find that the applicant's request for review, in substance, addresses issues that are identical to those raised in the first inquiry. I find that a second inquiry would constitute re-litigation of the same issues and claims based on the same underlying facts.

[43] In the abuse of process context, the Supreme Court of Canada has offered the following guidance when considering how re-litigation interacts with the principles of consistency, finality, judicial economy and the integrity of the adjudicative process:

- Re-litigation cannot be assumed to produce a more accurate result than the first proceeding.
- If the same result is reached in the second proceeding, the re-litigation will have been a waste of judicial resources, an unnecessary expense for the parties, and possibly an additional hardship for some witnesses.
- If the result in the second proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
- Re-litigation should be avoided unless the circumstances show that re-litigation is necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole.[24]

[44] The Earlier Orders include a cogent, well-articulated analysis of the issues. There is nothing in the material before me that suggests a second inquiry would contribute anything meaningful to that analysis. In these circumstances, I find that a second inquiry is not necessary to enhance the credibility or effectiveness of the OIPC's review process.

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[24] *Toronto*, *supra* note #18 at paras 51-52; *Figliola*, *supra* note #22 at para 34 and the authorities cited therein.

[45] On the other hand, conducting a second inquiry would clearly create administrative inefficiency while introducing substantial uncertainty about the outcome of the OIPC's adjudicative process. I do not think that that the benefit of testing the applicant's arguments against the same issues in a second inquiry would justify the harm that the uncertainty (and possible inconsistency) would inflict on the credibility of the OIPC's process.

Conclusion, Abuse of Process

[46] I conclude allowing the inquiry to proceed would violate the principles of consistency, finality, and judicial economy. In this matter, the integrity of the OIPC's review process is better served by cancelling the inquiry than by allowing the applicant's request for review to proceed. Therefore, I find that conducting an inquiry would constitute an abuse of process.

Conclusion, s. 56(1)

[47] I have determined that conducting an inquiry in this matter would constitute an abuse of process. I find that the appropriate exercise of my discretion as the Commissioner's delegate is to order this matter to be cancelled.

[48] In light of my decision, it is not necessary for me to consider whether the outcome of an inquiry is plain and obvious, and I decline to do so.

CONCLUSION

[49] For the reasons given above, under s. 56(1) I exercise my discretion as the Commissioner's delegate to not conduct an inquiry in respect of this matter.

March 11, 2025

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

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